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No. 85-402

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORMAN EUGENE AWREY,
Petitioner,

vs.

PROGRESSIVE CASUALTY INSURANCE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM OPPOSING CERTIORARI

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Petitioner argues for the first time that the United States Court of Appeals for the Sixth Circuit labored under a "fundamental flaw", i.e., that *Medley v. Canaday*, 126 Mich. App. 739, 337 N.W.2d 909 (1983), *lv. granted* 419 Mich. 870 (1984), *appeal dismissed*, December 18, 1984, is allegedly without precedential effect. Petitioner's "flaw", however, was never argued or brought to the attention of the intermediate appellate court, despite the fact that *Medley*—announced just before oral argument—was relied upon by Respondent and the Court below. Neither Petitioner's Motion for Rehearing and/or Motion for Certification to the Michigan Supreme Court filed on March 13, 1984 in the Sixth Circuit nor Petitioner's Supplement filed January 2, 1985 raised the point of law set forth by this Petition, pp. 7-10. It has, therefore, been

waived. *United States v. New York Telephone Co.*, 326 U.S. 638 (1946).

In any event, the legal position asserted by Petitioner is insubstantial. Neither *People v. George*, 399 Mich. 638, 250 N.W.2d 491 (1977) nor *People v. Phillips*, 416 Mich. 63, 330 N.W.2d 366 (1982) establish or hold that a Michigan Court of Appeals' decision which is rendered otherwise final by dismissal of Michigan Supreme Court proceedings is stripped of its value as precedent. Indeed, the traditional Michigan rule is that a final Michigan Court of Appeals' decision is binding precedent statewide until a conflicting decision with another state Court of Appeals' panel is announced. See *In the Matter of Hague*, 412 Mich. 532, 315 N.W.2d 524, 532, *reh. den.* 413 Mich. 1106 (1982); *Tebo v. Havlik*, 418 Mich. 350, 379, 380; 343 N.W.2d 181, 192, 193, *reh. den.* 419 Mich. 1201 (1984). When the Sixth Circuit released the original opinion in this case, there were no such conflicting decisions. Even if there were, in fact, later conflicting decisions, the Sixth Circuit is free under Michigan law to follow the case that it finds most persuasive. *Tebo*, fn. 15, 343 N.W.2d at 192.

As to Petitioner's view that *Medley* is without precedential effect, the Michigan Courts do not appear to agree. Most recently, in *Sederholm v. Michigan Mutual Insurance Co.*, 142 Mich. App. 372, 397; 370 N.W.2d 357, 367 (1985) (fn. 5), the Michigan Court, in effect, conceded that the traditional Michigan insurance "bad faith" excess liability definition set forth by *Wakefield v. Globe Indemnity Co.*, 246 Mich. 645, 225 N.W. 643 (1929) had been sufficiently expanded by *Medley* to allow the defense there, as here, to argue the more difficult *Medley* "bad faith" test of "fraud, conscious dishonesty or active wrongdoing" (but avoiding deciding the *Wakefield/Medley* question on other grounds).

Finally, the frivolous nature of Petitioner's position is further made apparent by two additional observations. *Commercial Union Insurance Co. v. Liberty Mutual Insurance Co.*, 137 Mich. App. 381, 357 N.W.2d 861 (1984) and *Riley v. Northland Geriatric Center*, 140 Mich. App. 72, 362 N.W.2d 894 (1985) are, as of this writing, still pending before the Michigan Supreme Court. [The *Commercial Union* Application was in fact *granted* on June 26, 1985.] If the analysis set forth by Petition, pp. 7-10, is correct, this means that neither *Commercial Union* nor *Riley* are of any precedential effect whatsoever and, consequently, they too, can be ignored. Secondly, counsel of record for Petitioner was also counsel of record for Medley in *Medley* and it can be argued that the settlement in *Medley* was a direct attempt to neutralize unwelcome precedent, given Petitioner's argument advanced here for the first time. Michigan precedent is not so easily managed.

Under the circumstances, Respondent believes that the Petition for Writ of Certiorari should be denied as utterly without merit, together with all costs.

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